IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

EX PARTE

NO. WR-75,828-02

PAUL DAVID STOREY

SUGGESTION FOR RECONSIDERATION
ON THE COURT'S OWN INITIATIVE

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Ware and Keith S. Hampton, attorneys for Applicant in the above-entitled cause, and respectfully suggests that this Court make the extraordinary decision in this extraordinary case to reconsider[1] the unprecedented review expressed in its per curiam and concurring opinions on October 2, 2019, and would show the Court the following relevant facts either cited in abbreviated fashion in these opinions or ignored altogether, and would reurge the law which should be considered as a preliminary matter before any decision to dismiss Applicant's claims as barred.[2] Counsel therefore shows the following:

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[1] Rule 79.2(d) of the Texas Rules of Appellate Procedure provides:

> A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

Tex.R.App.Pro. 79.2(d).

[2] This Court should also have had the full record in this cause, as argued in Applicant's *Alternative Suggestion for Reconsideration on this Court's own Initiative.*

Facts Supported by the Record Are Dispositive of Habeas Claims.

Tarrant County prosecutor Christy Jack argued to the jury at the sentencing phase of Applicant's death penalty case:

> So we get to the last question [mitigation] and that is, taking into consideration everything, Ladies and Gentleman, beginning with the circumstances of this crime – and you know what? His [Mr. Storey's] whole family got up here yesterday and pled for you to spare his life. And it should go without saying[3] that all of Jonas [Cherry's] family and everyone who loved him believe the death penalty is appropriate.

(Vol. 39; pp. 11-12). The Cherrys in fact did not believe the death penalty was appropriate; in fact, they were affirmatively opposed to Applicant's execution. After extensive hearings, the trial court determined that both Jack and her co-counsel, Robert Foran, knew this claim to be false. Its falsity was a closely-kept secret.

Jack testified that she did not tell Bob Ford, Applicant's initial habeas counsel, about the falsity of her assertion. (Vol. 1, pp. 130-132). Foran testified that he also

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[3] The phrase "it goes without saying" means:

> It is unambiguous, perfectly clear, or self-evident that; to be already widely acknowledged, established, or accepted that. *I know it goes without saying, but the staff restrooms are not to be used by students or visitors. It should go without saying, but you will receive an automatic zero if you are caught cheating on the exam.*

Farlex Dictionary of Idioms (2015).

> You say it goes without saying to mean that something is obviously true. *It goes without saying that if someone has lung problems they should not smoke. It goes without saying that you will be my guest until you leave for Africa.*

Idioms Dictionary, 3rd ed (Harper Collins Publishers 2012).

did not tell Ford. (Vol. 1, pp. 259-260). Applicant's appellate counsel, John Stickels, testified he did not know. (Vol. 4, pp. 26-27). Ford's counterpart, the State's appellate and habeas prosecutor in state court, Edward "Chip" Wilkinson, testified he did not know. (Vol. 4, pp. 19-21). Applicant's trial attorneys, Larry Moore and Bill Ray, did not know. (Vol. 2, pp. 31-32)(Vol. 4, p. 71). The State was also seeking the death penalty against Applicant's co-defendant, Mark Porter; however, his attorneys, Mark Daniel and Tim Moore, testified they also did not know. (Vol. 3, pp. 97-100; 133). No one else knew about the extraordinary fact of the Cherrys' opposition to Applicant's execution, and consequently, no one told Bob Ford.

Ford had no reason to know that Jack had lied and that she and Foran were concealing anything. Habeas counsel interviewed Applicant's trial counsel who had been informed by the prosecutor that the Cherrys "preferred not to be contacted[.]" (Vol. 2, p. 252). Ford had no reason to doubt these false assertions. There would be no reason for the issue to arise during habeas interviews of trial counsel. If it had, Bob Ford would have learned from trial counsel that any interview effort would likely be futile or worse. But it probably did not arise because absolutely no one would have thought it a good idea for Bob Ford to conduct a fishing expedition with the grieving parents of a murdered son.

There is no evidence that anyone other than Jack and Foran knew. Not even

Chip Wilkinson, the State's writ lawyer, knew. This circumstance weighs heavily in favor of the reasonable inference that Bob Ford was no exception to the category of lawyers, both State and defense, who were unaware of these unusual and important facts. Under the facts of this record, the trial court – with ample supporting evidence – found Bob Ford to be unaware of this hidden fact. Under well-established law, the trial court concluded Bob Ford to be reasonably diligent. *Holland v. Florida*, 560 U.S. 631, 653 (2010)(due diligence "is reasonable diligence, not maximum feasible diligence.")(internal citations and quotations omitted). The district judge, then, was compelled, in light of his assessment of the facts before him and well established law, to find that Bob Ford was unaware, a conclusion unsurprising in light of the unawareness of all the other lawyers involved in this case, State and defense.

Nevertheless, this Court completely discounted the district judge's well supported findings and dismissed Applicant's subsequent writ application because it attributed Bob Ford's unawareness solely to his own lack of reasonable diligence. *Ex parte Storey*, No. WR-75,828-02, pp. 4-5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam).[4] This Court's attribution is contrary to the

[4] "'Per curiam' is a Latin phrase meaning 'by the court,' which should distinguish an opinion of the whole Court from an opinion written by any one Justice." *Montana v. Hall*, 481 U.S. 400, 409 (1987)(Marshall, J., dissenting)(complaining about the misuse of per curiam opinions "over the dissent of those who would set the case for briefing, to resolve the merits of a case without devoting the usual time or consideration to the issues presented, is wrong.").

trial court's extensive and well supported investigation. It is also contrary to this Court's own established habeas standard of review.

Under ordinary habeas review, these facts would have been enough for this Court to defer to the trial court's conclusion that Bob Ford was diligent because he, like everyone else, did not know of the extraordinary circumstance in this case. In an ordinary habeas review, this Court would have deferred to a trial court's supported factual findings and adopted its recommendation. *See, e.g., Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex.Crim.App. 2011)("this Court is the ultimate finder of fact; the trial court's findings are not automatically binding upon us, although we usually accept them if they are supported by the record."). Yet this ordinary review is replaced by a per curiam opinion that imposes a burden unlike anything this Court has ever demanded of State or defense – proof directly from beyond the grave. Short of a seance, this new burden is one that can never be met.

This Court's per curiam opinion rejected the trial court's diligence findings because Applicant's counsel did not provide direct evidence from Bob Ford "showing what Ford did or did not know regarding the victim's parents' anti-death penalty views." *Ex parte Storey*, No. WR-75,828-02, p. 5, 2019 Tex.Crim.App. LEXIS 958 (Tex.Crim.App. Oct. 2, 2019)(per curiam). Under the per curiam's new requirement, the overwhelming and uncontradicted circumstantial evidence that Bob Ford was

unaware of the Cherrys' opposition is insufficient. Counsel must now directly prove a negative – lack of knowledge – from the testimony from a deceased attorney.

It is not reasonable to infer that Bob Ford knew. It is reasonable to infer that he did not know. In fact, the only reasonable inference is that had he known, he would have raised the issue.

There is absolutely no evidence, direct or circumstantial, that Bob Ford was aware. Any finding that Bob Ford *did* know would be one wholly unsupported by the evidence. Judge Young made findings that supported his considered recommendations and this Court should respect his findings, particularly in the light of the evidence in this case.[5] Unfortunately, the per curiam opinion charts a radical new review nullifying Judge Young's work.

This Court's New Rule of Habeas Review

The per curiam opinion rewrites the rule of deference to a trial court's fact-finding role. The long-standing rule has been that this Court upholds the findings if they are supported by the record. Under this opinion, however, this Court instead

[5] The concurring opinion asserted that Ford's unawareness of the prosecution's hidden facts was "doubtful." *Ex parte Storey*, No. WR-75,828-02, p. 6, 2019 Tex.Crim.App. LEXIS 958 (Crim. App. Oct. 2, 2019)(Hervey, J., concurring). There is literally no evidence whatsoever in this case that Bob Ford had any inkling that the Cherrys opposed execution for their son's killer. The concurring opinion's "finding" is wholly unsupported by the record. Were the concurring opinion written by a trial judge, this Court would be authorized – even obligated – to reject it.

scours the record to find any evidence that "undermines" the trial court's findings.

This per curiam opinion found that a single, snapshot portion of Mr. Cherry's testimony "undermines" the trial court's factual finding regarding Bob Ford's due diligence. *Ex parte Storey*, No. WR-75,828-02, p. 5 (per curiam). Relying exclusively upon one remark by Mr. Cherry, the per curiam opinion suggested that Bob Ford could have unquestionably discovered the prosecution's secret by merely interrogating the victim's father, Glen Cherry. As the per curiam analyzed the issue:

> The victim's father testified that he has disclosed his anti-death penalty views to ***"anybody that wants to know or has ever asked me."*** This testimony undermines the trial court's finding that the factual basis of the remanded claims was not ascertainable through the exercise of reasonable diligence prior to the filing of the initial writ application.

Id. (emphasis added). The per curiam opinion implicitly suggests that Mr. Cherry's testimony establishes that all Bob Ford needed to do was to simply ask him.

This Court should evaluate that slice of testimony in its context from the entire relevant portion of this questioning of Mr. Cherry. Under the State's examination, Mr. Cherry testified:

> A. Yes, I'm against the death penalty.
>
> Q. So that position formed before this terrible set of circumstances, correct?
>
> A. Yes.

Q. And your opposition to the death penalty would be to any – to anybody being executed?

A. I don't believe in the death penalty for anybody.

Q. And they asked you about Mr. Storey's mother, about your feelings about that. But that would be for any mother that was going to lose a son, you know, to execution, correct?

A. Yeah, I don't want anybody to have to go through that.

Q. Have you spoken with friends and family about your views on the death penalty?

A. Well, I know most of my family's views, I think.

Q. But, I mean, have you told them your views?

A. Yeah, it's not a secret.

Q. Yeah. And certainly you've told friends?

A. Yeah, anybody that wants to know or has ever asked me or we've ever talked about it. I don't just go around telling everybody all my views.

(Vol. 3, pp. 174-175).[6]

Mr. Cherry's inflection or tone of voice or facial expressions are not reflected in this record. His hesitations, his confidence, his pauses are nowhere to be found by

[6] Beyond the per curiam's abbreviated recitation of the statement of facts, it is also significant that the testimony was elicited by the State, despite Applicant's *Motion to Preclude the State from Contending That Counsel Failed to Exercise Due Diligence In Ascertaining the Cherrys' Opposition to Paul David Storey's Execution*, filed with the Tarrant County District Clerk on September 11, 2017. This Court apparently never received, and therefore did not consider, this motion. It did however, have the State's objections.

any judge of this Court. The only judge who actually witnessed Mr. Cherry during his testimony was Judge Young who was called upon to consider different interpretations of testimony, including interpretations in light of other evidence and the testimony of other witnesses.

One interpretation of Mr. Cherry's statement suggests he was ready and willing to disclose his opposition to habeas counsel, had Bob Ford merely called. Another interpretation is that he was a private man, though open to those who were close to him, like friends and family, and would not have returned a call. Judge Young resolved these competing interpretations by considering all the evidence and live testimony developed on this issue.

The interpretation of Mr. Cherry's testimony is wholly dependent on the trial judge's attention to his testimony, body language and other measures. Judge Young was called upon to resolve the meaning of Mr. Cherry's statement, and he resolved it in favor of his ultimate conclusion regarding Bob Ford's diligence. This Court should defer to his finding.

Invariably there will be evidence that is arguably inconsistent with or "undermines" other evidence. It is the trial court which resolves clashing evidence, particularly live testimony. If this Court can supplant the trial court whenever it finds a piece of evidence that arguably "undermines" a trial court's finding which is

otherwise well supported by the record, trial courts may justifiably wonder whether their fact-finding efforts matter.

Instead of asking whether the judge's findings are supported by the record, this Court now asks a new question – whether other evidence can be found which "undermines" the trial court's ultimate factual determinations. This new standard renders trial court resolutions meaningless because almost any case will have arguably conflicting evidence, which can then form a new factual basis for members of this Court to arrive at exactly the opposite determination entrusted to trial judges like Judge Young. This departure is unwarranted and remains completely and totally unsupported by any of the scant caselaw citations in the per curiam or concurring opinions.

The per curiam opinion relied upon *Ex parte Thuesen*, 546 S.W.3d 145 (Tex.Crim.App. 2017). *Thuesen* concerned purely legal matters – the authority and propriety of a trial court judge who recused himself, then withdrew his recusal. *Id*. *Thuesen*, then, offers no support for any of the propositions in the per curiam opinion.

Thuesen relied upon *Ex parte Reed*, 271 S.W.3d 698 (Tex.Crim.App. 2008) for the proposition that this Court "is the ultimate factfinder in habeas corpus proceedings. The trial judge on habeas is the 'original factfinder.'" *Id*. at 727. While counsel agrees with this general observation, *Reed* offers no support for this Court's

disposition of Applicant's claims. *Reed* supports Judge Young. Had Judge Young made a contrary finding, he would have found himself on the wrong side of this Court's decision in *Reed* (condemning unfounded trial court findings).

This Court in *Reed* made it a point to look for evidence which *supported* the trial court's findings of fact, not evidence which *undermined* its findings of fact. This Court in the instant case has fundamentally altered its habeas review by inverting its long standing rule of looking for evidence supporting the trial court's findings, to looking for any evidence at all which arguably "undermines" those findings. *Reed* supports Applicant's position, not the new review undertaken in this case.

Further, in *Reed*, the trial judge had "adopt[ed] the State's proposed findings and conclusions verbatim" including those which were unsupported or misleading. *Ex parte Reed*, *supra* at 729. While this Court admonished courts to refrain from rubber-stamping proposed findings, this Court ultimately decided "that the few instances in which [a trial judge's] findings are inconsistent or misleading do not justify a decision [by the Court of Criminal Appeals] to totally disregard the findings that are supported by the record[.]" *Id.* Thus, even when a judge has adopted unfounded or misleading findings, this Court still insists on upholding that judge's

findings when they are supported by the record.[7] Judge Young – who made no unsupported or misleading findings – is surely owed at least the same deference as a judge who did.

The issue in *Reed* was how this Court would treat a trial court's findings that were both founded and accurate reflections of the record as well as findings that were unfounded or misleading.[8] *Reed*, *supra* at 726. This Court resolved the issue by holding that "it is appropriate to remain faithful to our precedent" which requires this Court to defer to trial judge findings that are supported by the record, but clarified that this Court would "afford no deference to findings and conclusions that are not supported by the record[.]" *Id.* at 727. Despite the troubling fact-finding

[7] In this case, Judge Everett Young carefully prepared his own findings. The per curiam opinion states: "Following a three-day hearing in September and October 2017, the trial court adopted Applicant's proposed findings of fact and conclusions of law." *Storey*, *supra* at 3. A cursory comparison between Applicant's proposed findings and Judge Young's findings reveals that he acted completely independently, contrary to the per curiam opinion's assertion. The assertion that he simply adopted Applicant's proposed findings like the judge in *Reed* is inaccurate and unfair to Judge Young. Compare 4th Supplemental Clerk's record (proposed findings and conclusions) with 5th Supplemental Clerk's record (Judge Young's actual findings and conclusions).

[8] This Court had identified the issues as:

> Assuming, *arguendo*, that the court has entered a finding of fact or conclusion of law that has multiple sentences or phrases and that a portion of the finding or conclusion is supported by the record, while another portion is not, to what extent does this Court owe deference to the trial court on such a finding or conclusion? May the Court disregard the finding or conclusion in its entirety?
>
> Assuming, *arguendo*, that numerous findings and conclusions, or parts thereof, are not supported by the record, how should this affect the level of deference to the findings and conclusions as a whole?

Ex parte Reed, *supra* at 726.

irregularities in *Reed*, this Court nevertheless deferred to trial court findings which were suspect because some were unsupported or misleading.

Judge Young's findings contain nothing that is unsupported or misleading. On the contrary, his findings are strongly supported by this record. They are not misleading, but spot on.

Insofar as the per curiam opinion suggests that Judge Young's judgment lacked gravity, this Court need only look at the overwhelming evidence that supports the judge's conclusion that Bob Ford was diligent. Nowhere is there any identification of unsupported findings. Indeed, the per curiam opinion could find only one remark by one witness plucked out of its context.

The established standard of review should govern this case. The issue for this Court under settled precedence – including *Reed* upon which this Court's decision rests – is whether the trial court's findings in this case are supported by the record. The trial court's findings in this case are strongly supported by the evidence. Accordingly, this Court should defer to the trial court's well supported findings that Bob Ford was unaware of the Cherrys' opposition to Paul Storey's execution and that reasonable diligence did not require him to make unwarranted inquiries to the Cherrys. Yet this Court has spurned its own law, and now demands contact between those who wish to be left alone and lawyers who also wish to leave them alone.

This Court's New Requirement for Initial Habeas Counsel

The per curiam opinion determined Bob Ford to be less than diligent because all he had to do was seek the answer about a fact he had no reason to question. This new rule imposes upon initial habeas counsel an additional duty which, if unfulfilled, declares him to be less than reasonably diligent. Lawyers who represent death-sentenced defendants must now make efforts to determine the murder victim survivors' views, just in case in light of the *Storey* rule. It is a bad rule that no one asked for or welcomes.

No one suggested this view. Prosecutors did not request this new rule. Defense lawyers are already cringing. Victims and their families do not want to be contacted by anyone, especially by defense attorneys or their agents. This new rule – making lawyers for a death-sentenced inmate interrogate the survivors of the murder victim – is, at a minimum, dysfunctional, and at worst, insensitive and immoral. Undoubtedly, it will have disastrous consequences, particularly in the lives of victims.

This focus on the views of the Cherrys also misses the entirety of this subsequent writ application. It is not merely that the Cherrys were opposed to Applicant's execution. Applicant's claims are rooted in the fact that the prosecution knew of their opposition and recognized the many ways it could be used by the

defense not only at trial but also during the plea negotiation process. The prosecutors hid their knowledge and misled trial counsel, lied to the jury and the trial judge, concealed these facts from habeas counsel, then tried to cover it up, including through untruthful sworn testimony found to be not credible by the district judge. These are the facts which should occupy this Court's attention.

Under the Court's opinions, the only blameworthy court participant is Bob Ford. He is the only person faulted. On account of his being dead, he cannot provide that direct evidence demanded by the per curiam opinion. Ford can be faulted only under this Court's new form of review of counsel's performance, its new "hindsight review."

This Court's New Hindsight Review

The Court's review of Bob Ford judges him solely through the lens of hindsight. Everywhere in law, hindsight is forbidden. There is good reason for judicial disfavor of hindsight review.

As a matter of constitutional law, hindsight judicial review is condemned:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. 668, 689-90 (1984). Hindsight makes it "all too easy for a court ... to conclude that a particular act or omission of counsel was unreasonable." *Id*. "[I]t is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight." *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965). This prohibition against this sort of review is mirrored in civil malpractice law. *Ex parte Lewis*, 537 S.W.3d 917, 921 n.16 (Tex.Crim.App. 2017)(perceived errors by counsel "should not be gauged by hindsight or second-guessed")(quoting 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §18.17 at 59 (5th ed. 2000)). Prosecutors are similarly spared hindsight review. *See, e.g., Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 56 (D.D.C. 2009)(immunity reflects "the profound societal concern that prosecutors be free to perform their vital duties courageously and without fear that their actions will be judged in hindsight.").

Defendants accused of civil negligence are also spared the glaring review of hindsight, like their counterparts in criminal court. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994)(judicial review "requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight."). Civil liability "is not measured by hindsight, but instead by what the actor knew or should have known at the time of the

alleged negligence. In other words, there is neither a legal nor a moral obligation to guard against that which cannot be foreseen in the light of common or ordinary experience[.]" *Boren v. Texoma Med. Ctr.*, 258 S.W.3d 224, 230 (Tex.App. – Dallas 2008, *no pet.*)(internal citations and quotations omitted).

This Court, then, is well aware of why hindsight review of attorney behavior is wrong. Yet it singled out habeas counsel and judged him by one remark from Mr. Cherry spotted in the pure beam of hindsight. This review is unfair for all the reasons hindsight is rejected in law.

In hindsight and under one eclectic imaginary scenario, Bob Ford would have located and interrogated the Cherrys who would have promptly shocked him with news of their opposition to his client's execution. Under this "what-if" scenario, Bob Ford should have trekked to the home of the grief-stricken parents of a murdered son and gently rung the doorbell, a conversation with Mr. Cherry would have ensued, all the facts revealed. If only Bob Ford had undertaken this measure, hindsight assures the per curiam opinion, he would have discovered the prosecution's secret just in time for the imagineers' fairy-tale ending.

Here in the real world, hindsight is not helpful to judicial review, but distracting and misleading. It does not renounce assumptions; it feeds them. This case is the paradigm why hindsight is not employed to resolve issues of fact.

Hindsight is never wrong because the view is always clear and perfect. What might have occurred becomes what would have occurred. It is a view judges should avoid.

Even in hindsight under this imagined scenario, Bob Ford was diligent. Being unaware of the Cherrys' opposition, he would have had no reason to inquire about it. After Mr. Cherry answered that hypothetical doorbell, the conversation would have more likely been:

> BOB FORD: Hello, I'm Bob Ford, Mr. Storey's attorney. I'm sorry about your loss.
>
> GLEN CHERRY: Why are you here?
>
> BOB FORD: I'm not sure. I don't usually do this.
>
> GLEN CHERRY: How can I help you?
>
> BOB FORD: I'm not sure about that, either. Do you have anything to tell me that would raise a factual claim cognizeable in an initial application for writ of habeas corpus?
>
> GLEN CHERRY: Like what?
>
> BOB FORD: I wish I knew.

A Fair Assessment of Bob Ford's Reasonable Diligence

If hindsight is removed from this Court's review, it should be clear that Bob Ford exercised reasonable diligence. His initial writ application – which this Court possesses – reflects his diligence. It also contains nothing about the issue in this case,

evidence from which this Court can infer reflects Bob Ford's unawareness of the issue. In fact, that is the only reasonable inference. Counsel for Applicant's co-defendant, Mark Daniel, testified about Ford:

> Bob Ford was a passionate lawyer. He was a fearless advocate. Not only at the trial level but the post-conviction work he did. He was thorough beyond description. When you said the question was work ethic, Bob probably worked too hard, in my estimation. ... [D]ue diligence is kind of a baseline standard, in my estimation. Bob Ford always performed far and above what is considered to be due diligence. He went far beyond what is considered to be due diligence in his trial work and his appellate work, from my outside observations.

(Vol. 2, pp. 99-100). From all other "outside observations," every testifying witness affirmed this estimation. None contradicted it.

Bob Ford remained unaware of the key facts in the same way everyone else was unaware. Trial counsel Larry Moore did not know:

> I have no doubt that I would have been telling Bob Ford, he wouldn't have had to ask me about it because I would have been telling him, that is the first and foremost thing that you need to put in this writ to bring forward to the Court of Criminal Appeals because it's absolutely atrocious.

(Vol. 2, pp. 31-32). Trial counsel Bill Ray testified that he, like Moore, did not know. (Vol. 4, p. 71). Ford's counterpart, counsel for the state in the initial writ, Chip Wilkinson, did not know. (Vol. 4, pp. 19-21). Like all other lawyers involved in the case, Bob Ford was unaware because no one told him and he had no reason to believe

that the Cherrys were opposed to Applicant's execution.

Ford's sterling reputation for diligence is unassailed. Every witness, including the State's witnesses, agreed that Bob Ford was diligent. Judge Mollie Westfall described Bob Ford as "very zealous" and "very diligent." (Vol. 3, p. 203). Even Christy Jack agreed Bob Ford was "very diligent." (Vol. 1, pp. 130-132). Only this Court disagrees under a record that is completely unsupportive of this contrary conclusion.

It is unreasonable to assume that Bob Ford acted without diligence in this case. These witnesses are people who knew him and worked with him. Their collective description portrayed an aggressive and diligent lawyer who would not have remained silent, stationary or sympathetic to the prosecutorial self-interests upon learning that Jack and Foran had hidden this favorable information from him. Consistent with everyone else in this case who was unaware, Ford proceeded with his work not as a lawyer inattentive to facts learned through his investigation, but as another victim of the prosecution's calculated concealment.

Wholly absent from this Court's distorted review of Bob Ford's diligence was the unfairness of faulting him for failing to discover what the prosecution successfully had hidden from him. Under this Court's order and opinions, the State may poke out the eyes of habeas counsel, then benefit from its crime on the grounds

that counsel is blind. This Court should reconsider its analysis under basic applicable and very long established equitable doctrines.

Equitable doctrines unmentioned by this Court's reasonable diligence analysis.

Habeas corpus is "governed by equitable principles." *Fay v. Noia*, 372 U.S. 391, 438 (1963). This Court applies equitable common-law principles of "elements of fairness and equity" because "habeas corpus is an equitable remedy." *Ex parte Perez*, 398 S.W.3d 206, 210, 216 (Tex.Crim.App. 2013). While equitable principles govern, some have been codified.

The reasonable diligence requirement in chapter 11 is simply a legislative recognition of the judiciary's doctrine that "equity aids the vigilant, not those who slumber on their rights." *Callahan v. Giles*, 137 Tex. 571, 576, 155 S.W.2d 793, 795-96 (1941)(due diligence maxim is "a fundamental principle of equity jurisprudence"). Article 38.49 is another example of codification of an equitable doctrine, i.e., forfeiture by wrongdoing. Tex Code Crim. Pro. art. 38.49. Accordingly, this Court should reconsider its opinions and decision by addressing the other applicable equitable doctrines under the unique circumstances in this case.

The State secreted the Cherrys' opposition to the death penalty from trial counsel – a fact recognized by every member of this Court. None of the opinions, per

curiam or concurring, even attempt to justify the prosecution's lie to the jury, the prosecutors' concealment from counsel, or their lies to the court. Even the concurring opinion considers how their bad acts should be considered, not whether they were wrong. No one on this Court defends the prosecutors' concealment of this fact or their dishonest sworn testimony at the writ hearings. The indefensibility of misconduct should be included in this Court's diligence analysis.

The analysis should also recognize the value of the Cherrys' opposition. The concealed facts were so valuable to the prosecution that it concealed them from discovery. Under this Court's current decision, it is a wrong worth committing, contrary to long-standing principles of equity. This Court should reconsider its decisions in light of this unjust consequence.

"He that hath committed iniquity shall not have equity." Richard Francis, Maxims of Equity 5 (London, Henry Lintot, 3rd ed. 1746). Contrary to this ancient equitable maxim, this Court's dismissal of this subsequent writ application delivers the deceivers their greatest prize. That prize is awarded for winning a death sentence by falsely asserting to the judge and jury that the Cherrys supported a death sentence. The per curiam opinion is faithless to the "well settled principle of law that a party cannot benefit from his own wrong[.]" *Smith v. State*, 272 S.W. 793, 794 (Tex.Crim.App. 1925)); *Reynolds v. United States*, 98 U.S. 145, 160 (1878)("no one

shall be permitted to take advantage of his own wrong."). This Court should reconsider its opinions as a matter of equity and conscience.

The fuller equitable inquiry Applicant seeks is no different from how the federal courts employ equity in cases where counsel misses a statutory deadline. The federal courts provide the remedy of equitable tolling under the same equitable principles urged herein. Where counsel is found to have failed to exercise due diligence (whether it is timeliness or discovery), the federal courts also ask whether "some extraordinary circumstance stood in his way" which prevented counsel from meeting his duty. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). If an "extraordinary circumstance" hobbled counsel, then any lack of diligence is excused. *Holland v. Florida*, 560 U.S. at 632 (courts "must often "exercise [their] equity powers ... on a case-by-case basis" to permit consideration of otherwise barred claims)(citations omitted). Concealment of the Cherrys' views stood invisibly in the way of Bob Ford's awareness of these facts.

The remaining equitable question for this Court is the value it assigns to the prosecutorial misconduct in this case. This Court must regard it as either routine and ordinary, or unusual and extraordinary. If this Court considers the prosecutorial misconduct established in this case to be extraordinary, then this Court should not fault Bob Ford for his failure to learn about the prosecution's deception. Bob Ford's

unawareness was due to the extraordinary efforts by prosecutors which prevented him from discovering their hidden and concealed misconduct, just as they had duped trial counsel for both defendants and even to their own state habeas counsel.

Emphatically, this case does not concern merely an issue of negligent counsel, i.e., something habeas counsel should have done, but failed to do. It is different because the prosecution had a clear and unclean hand in sabotaging habeas counsel's investigation. In order to fairly consider Bob Ford's diligence, this Court should consider the prosecution's misconduct in this regard.

Equity demands that Bob Ford be regarded as diligent. To do otherwise congratulates identified wrongdoers at the expense of a universally recognized conscientious attorney. After all, the judiciary's equitable powers "can never be exerted in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933).

Equity's fairness inquiry is the "linchpin" for the judiciary. *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). Equity seeks "to promote justice and to prevent a party from benefitting by his own misleading representations[.]" *Richey v. Miller*, 142 Tex. 274, 279, 177 S.W.2d 255, 257 (1944).

Equity considers whether one party knowingly makes "a false representation or concealment of material facts" which prejudices an unaware adversary. *Gulbenkian v. Penn*, 151 Tex. 412, 418, 252 S.W.2d 929, 932 (1952)(stating the requirements for equitable estoppel). If new trials may be awarded under these circumstances, surely this Court will consider the prosecution's misconduct in evaluating Bob Ford's performance.

It is unusual for this Court to withdraw its opinions. However, this case is unusual for many reasons. The new rule of review of the supported independent findings of a trial court deserves reconsideration. The new duty imposed upon habeas counsel needs serious reflection. The other arguments advanced by habeas counsel regarding how the prosecutors' misconduct impacted Bob Ford's representation ought in fairness be addressed by this Court.

This Court's concurring and dissenting opinions indicate some desire for counsel to address at least some aspects of Applicant's substantive arguments. Additionally, the concurring opinion in this case addresses in *dicta* some of the merits of Applicant's substantive arguments, but contains serious misperceptions of Applicant's claims. In light of the unusualness of this case and its issues, this Court should order the parties to brief the questions which clearly trouble members of this Court, as reflected in the dissenting and concurring opinions. *Ex parte Storey*, *supra*

(Hervey, J., concurring)(Yeary, J., dissenting). For these reasons, this Court should, on its own initiative and inherent constitutional powers, withdraw its previous opinions and file and set this case for additional briefing on these issues under the circumstances of this unusual case.

PRAYER

Counsel prays this Court to reconsider its opinions, apply settled law and equity to its review of Bob Ford's diligence, and order further briefing on the issues raised by the opinions in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE: By my signature below, I certify I have served a true and correct copy of the foregoing pleading upon counsel for the State, Attorney Pro Tem Travis Bragg, at Travis.Bragg@oag.texas.gov on October 16, 2019.